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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 473

COYNE ELECTRICAL SCHOOL, INC.,
Petitioner,

vs.

F. J. BUCKLEY AND E. H. BUCKLEY, Doing Business As F. J. BUCKLEY AND COMPANY,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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"political or personal influence" in his activities in Washington. The mere fact of such activities alone makes it necessary to strike down his claim for the large amount of fees he would be awarded if the decision of the Appellate Court of Illinois is permitted to stand.

III

THE GENESIS AND INTENT OF EXECUTIVE ORDER 9001

Executive Order 9001 (6 F.R. 6787) was issued by the President on December 27, 1941, and provided in relevant part as follows:

> "5. Every contract entered into pursuant to this order shall contain a warranty by the contractor in substantially the following terms:
>
> "The contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to annul the contract, or, in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business."

Paragraph 5 of the Executive Order did not disturb sound commercial practices existing prior to the war. Its plain purpose was to protect the Treasury of the United States from the cost of fees for questionable services of questionable value. This is best explained by the comment of Judge Learned Hand, speaking for the Court in *Reynolds* v. *Goodwin-Hill Corp.* (1946, CA2), 154 F. 2d 553, where he said (p. 555):

> "The critical words are: 'bona fide established commercial or selling agencies maintained by the contrac-

> tor for the purpose of securing business,' . . . The purpose of the section is reasonably plain: the payment of contingent fees was permitted when made to an agent *employed generally to drum up business for the contractor,* presumably because it was thought wise to allow contractors to do business in their accustomed way, in spite of the possibility that the inducement of a commission might on occasion result in abuses. But it was also thought that *to employ persons to procure specific contracts upon a contingent fee,* was likely to result in selecting those who had, or were supposed to have, some especial access to officials; and that this *could not be tolerated.*" (Italics supplied.)

As we have pointed out above, Buckley could not possibly come within the exception provided in the Executive Order, as his employment was limited to the procurement of government contracts, and a contingent fee for this purpose, as Judge Hand points out, "could not be tolerated."

Decisions Under Executive Order 9001

This Honorable Court has not had occasion to consider the purpose and effect of Executive Order 9001 in this context. *All* of the decisions of the Courts of Appeal sustain the contention made by Coyne both in the Petition and in this Brief that under no circumstances can Buckley be considered a bona fide agent under Executive Order 9001. These cases further follow the rule announced in the decisions of this Court that a contingent fee agreement to pay for the solicitation of federal contracts is wholly void.

Reynolds v. *Goodwin-Hill Corp.,* did not directly pass upon the question of public policy, but found that the plaintiff in that case was within the exception provided in Executive Order 9001. The plaintiff in that case sued for commissions due him as a sales agent of the defendant for procuring contracts on its behalf with the United States Army Engineer Corps. The trial court found that the

plaintiff was the general sales manager or general sales agent of the defendant company and had held this position for many years, with authority to solicit business for the defendant in all phases of its business, both civilian and government. Under these circumstances the Court felt that the plaintiff came within the exception.

For some reason which we find difficult to understand, the Majority Opinion of the Appellate Court does not make mention of the decision of the Court of Appeals for the same Circuit, decided a year later, in *Bradley* v. *American Radiator & Standard Sanitary Corp.*, 159 F. 2d 39, where the court pointed out:

> "The exception [Executive Order 9001] creates a privileged class who may receive contingent fees for securing government contracts, while others may not. Not only should grants of special privilege be jealously restricted, but such a restriction is also in the interest of maintaining the integrity of governmental contracting procedure. Moreover, the use of the words 'maintained by the contractor' suggests an intention to restrict the exception to continuing relationships between the contractor and his agent. The contract alleged in the complaint violates the public policy declared in the Executive Order."

It will be noted that the court used the words "specific contracts" advisedly, as there the plaintiff was engaged to procure as many orders as possible from the Government and he was highly successful in that venture. Nevertheless, the court found the claim invalid because the plaintiff's efforts were confined to procuring government contracts. This conforms to the practical aspects of government procurement, as it is more likely that the agent would be employed to procure as many government orders as possible rather than a single contract. The vice of the contingent fee is not overcome simply by multiplying his activities.

The Controlling Flintkote Case

The case of *Mitchell* v. *Flintkote Co.*, 185 F. 2d 1003 (CA 2), deserves special discussion in this Brief. That case was not decided until January 4, 1951, a few weeks after the Buckley case had been argued and submitted to the Illinois Appellate Court. That circumstance we suggest was highly unfortunate since the Illinois Court did not have the benefit of the able and decisive opinion in that case. The plain fact is that the *Flintkote* case directly contradicts the holding of the Illinois State Court in the Majority Opinion below. The Illinois Court had held, by a rather legalistic process of argument, that Executive Order 9001 did not apply in the Buckley case, or if it did, that Buckley came within the "exception" of that Order. In the *Flintkote* case, under an almost identical situation so far as the question of legality is concerned, the able federal Court held directly to the contrary and said:

> "Executive Order 9001 is rigorous in its requirements. The Order flatly requires that no person be employed on contingent fee 'to solicit or secure' the contract . . .
>
> "The Flintkote agreement with Mitchell was made in New York City, and in his Brief plaintiff cites two New York cases which indicate that the New York Courts hold Executive Order 9001 not decisive of the issues in this case. But this does not alter our conclusion. *Order 9001 states a Federal rule of public policy and Federal, not State, law governs its applicability.*" (Italics added.)

It should be stated here that the opinion in the *Flintkote* case cites the New York cases to which it refers[8] in the above quotation, and then continues:

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[8]These New York cases *(Leahy* v. *Brooklyn, etc.*, 69 N.Y.S. 2d 596; and *Singer* v. *Bruner-Ritter, Inc.*, 42 N.Y.S. 2d 881, affirmed 44 N.Y.S. 2d 589) are cited and quoted by the Majority Opinion of the Illinois Appellate Court, in support of its holding on the case at Bar.

> "The 'checker-board' pattern imposed by *Erie R. Co.* v. *Tompkins* is necessarily unsuited to matters subject to federal regulation, and hence state law does not control the disposition of suits which . . . involve interpretation or application of federal law. If, as must be conceded, the national government has power to protect itself against contracts of the kind here in question, the protection afforded must be uniform in all its ramifications, including a uniform rule governing the enforceability of contingent fee contracts between principal and agent."

The conclusion is obvious that the decision of the Majority of the Illinois Appellate Court below is in direct conflict with the federal law, as established by Executive Order 9001, and as particularly announced in the *Flintkote* case.

Executive Order 9001 A Matter of First Impression for This Court

We end this Argument by pointing out the important fact that the construction and interpretation of Executive Order 9001 as raised in the Petition presents a question of first impression for this Court. As we have shown above, this notable Executive Order has been passed upon and construed by the state courts in several cases; and also has been construed by the federal courts in a number of cases. But the language of that Order has never received any construction from this Court.

One of the grounds specified in Rule 38 of this Court concerning certiorari (Par. 5) states that review by certiorari will be considered by this Court in its discretion, particularly:

> "(a) Where a State Court has decided a Federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court."

The situation mentioned in that language of Rule 38 is, we say, specifically presented by the Petition in this case. Here, then, we have a further ground (in addition to those already mentioned) why it would seem just and appropriate to grant certiorari in this case.

CONCLUSION

For the reasons indicated in this Brief, it is respectfully submitted that this case is one calling for the exercise by this Honorable Court of its supervisory powers over questions of federal law. To that end a writ of certiorari should be granted to review the Majority decision of the Appellate Court of Illinois, and this Court should reverse that decision.

Respectfully submitted,

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Dated at Chicago, Illinois,
December 5, 1951.

SUBJECT INDEX

	PAGE
Argument	3
I. The Petition was Not Filed in Apt Time	3
II. This Court Does Not Usually Question Findings of Fact Made by Highest State Courts	7
III. Executive Order 9001 Does Not Bar This Action	10
IV. This Contract is Valid Under General Law	15
Conclusion	17
Statement of the Case	1

Authorities Cited.

Cases.

Aachen & Munich Ins. Co. v. Crawford, 199 Ill. 367, 370 (1902)	8
Aetna Standard Engineering v. Comm., 15 T.C. 284 (1950)	16
Allison v. Dodge, 287 F. 621 (C.A. 3d 1923)	15
2nd Opinion, 13 F. (2d) 588 (C.A. 3d 1926)	15
Alloy Products Corp., 4 C.C.F., Par. 60,389 (1947)	13
Beach v. Illinois Lumber Co., 92 F. Supp. 564 (E.D. Ill. 1950)	11
Bradley v. American Radiator & Standard Sanitary Corp., 159 F. (2d) 39 (C.A. 2d, 1947)	11, 12
Bruce's Juices v. American Can Co., 330 U.S. 743 (1947)	14
Buckley v. Coyne Electrical School, Inc. (R. 419, 343 Ill. App. 420, 99 N.E. 2d 370)	1
Cohen v. Lerman, 408 Ill. 155 (1951)	15
Columbia Theatre Co. v. Adsit, 211 Ill. 122, 124, (1904)	8
Coyne v. Superior Incinerator Co., 80 F. (2d) 844 Mo. 1948 (C.A. 2d 1936)	15
Dept. of Banking etc. v. Pink, 317 U.S. 264, (1942)	6
Ebeling v. Swaine Mfg. Co., 209 S.W. (2d) 892 (Mo. 1948)	12

PAGE

Grody v. Scalone, 408 Ill. 61 (1950) 15
Groome v. Freyn Engineering Co., 374 Ill. 113 (1940) 16
Gypsy Oil Co. v. Escoe, 275 U.S. 498 (1927) 7
Hadley v. Union Trust and Savings Bank, 308 Ill. 175 (1923) 8
J. E. Hanger, Inc. v. Fitzsimmons, 273 F. 348 (C.A.D.C. 1921) 15
Jamieson v. Iles, 219 Ill. App. 432 (1920) 16
Lewy v. Standard Plunger Elevator Co., 296 Ill. 295 (1921) 16
Martin v. Estate of Ida I. Martin, 377 Ill. 392, 395 (1941) 5
Milkwagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287 (1940) 8
Mitchell v. Flintkote Co., 185 F. (2d) 1008 (C.A. 2nd, 1951) 12
Morse v. U. S., 270 U. S. 151 (1926) 6
Muschany v. U. S., 324 U. S. 49 (1944) 13
North American Iron and Steel Co. v. Navy Department, 4 C.C.F., Par. 60,238 (1947) 13
O'Brien v. Galesburg National Bank, 359 Ill. 415, 418 (1935) 8
Penn Plate Glass Co. v. J. H. Rice Co., 216 Ill. 567, 574 (1905) 8
Providence Tool Co. v. Norris, 69 U.S. 45 (1864) 16
Reynolds v. Goodwin Hill Corp., 154 F. (2d) 553, (C.A. 2d, 1946) 11, 12
Simon v. Reilly, 321 Ill. 431, 433 (1926) 8
Steele v. Drummond, 275 U.S. 199 (1927) 15
Valdes v. Larrinaga, 233 U.S. 705 (1914) 15
Wylie v. Cox, 56 U.S. 415 (1853) 15

PAGE

STATUTES AND OTHER REFERENCES.

Comptroller General's Decision No. B-26993, 22 Comp. Gen. 124 (1942) 13

First War Powers Act (50 App. U.S.C.A. § 601 et seq.) 10, 12

Executive Order 9001 (50 App. U.S.C.A. § 611) 3, 7, 10

Illinois Practice Act (Ill. Rev. Stat. (1951) Ch. 110, Section 199 (b) 4

Section 213 8

Illinois Supreme Court Rules, Rule 35 (Ill. Rev. Stat. (1951) Ch. 110, § 259.35) 8

Judicial Code (28 U.S.C.A. § 2101 (c)) 2, 5

Report of the Hearings of the House Naval Affairs Committee on the Progress of the War Effort, Vol. 1, 78th Congress, first session (Exhibit 601) 12

Williston's Treatise on Contracts, Section 1729A 16

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

STATEMENT OF THE CASE.

Petitioner's statements of facts both in the petition and in the brief contain serious inaccuracies. The facts are fully set forth in the opinion of the Appellate Court (R. 419, 343 Ill. App. 420, 99 N.E. 2d 370). The so-called summary statement in the petition is an argument based on isolated excerpts from the very extensive testimoney heard by the Master. (2144 record pages and 187 exhibits). Further, the judgment of the Appellate Court, to review which this writ is sought, became final on June 22, 1951 when that Court denied petitioner's petition for a certificate of importance as the basis of an appeal to the Illinois Supreme Court (R. 364), and not

on September 21, 1951 as claimed by petitioner (Pet. 1), since the abortive attempt of petitioner to invoke the appellate jurisdiction of the Illinois Supreme Court to review the Appellate Court's decision, which under Illinois practice is made final, cannot serve to extend the 90-day period in which the Judicial Code provides that writs of certiorari must be sought. (28 U.S.C.A. Sec. 2101 (c)). Consequently this petition is not filed in apt time.

Secondly, the deprecating language of the petition as to the work performed by Buckley (Pet. 2) seeks to hide from the Court the fact that petitioner sought out and hired Buckley to act as its agent to secure government war contracts and that Buckley performed extensive services, all to petitioner's complete satisfaction, which netted it contracts in excess of $1,226,722. (R. 26, 27), all of which petitioner retains, seeking to avoid liability on its agreement on the claimed grounds of illegality. Similarly, the statement of the petition (Pet. 4) that Buckley was the only agent in Washington soliciting training contracts on a percentage basis is absolutely contrary to the facts (R. 335, 336). Petitioner's argument that Buckley lacked experience in educational matters and therefore the qualifications to properly represent Coyne (Br. 2) is entirely beside the point since Buckley was hired to act as a salesman to present to the proper officers the merits of petitioner's school in the best possible manner, which was so ably done that petitioner secured contracts totalling over 1¼ million dollars as a result of his efforts (R. 245); and the services in this regard were more than gratefully received by petitioner as complete and sufficient under the terms of their contract, and part payment thereon made (R. 23, 24, 46).

Lastly, but most important, the entire petition is based on the argument that improper influence was either con-

templated by the parties in their contract or used by Buckley in securing the Government contracts. This contention, as are all of the contentions listed above, is absolutely contrary to the record, to the findings of the Master, to the decree of the Chancellor and to the judgment of the Appellate Court, and it should be noted that at no time did petitioner question the correctness of these findings before the Appellate Court by cross appeal, the procedure which Illinois practice requires if review of such findings was desired.

Petitioner has urged, as a grounds of invoking the jurisdiction of this Court, that the Appellate Court has interpreted Executive Order 9001 (50 App. U.S.C.A. § 611.) in accordance with State law and contrary to Federal law, (Pet. 9) and has urged the existence of divergent so-called Federal and State rules in relation thereto. This argument is misleading in that a consideration of the cases, both Federal and State, cited in the Appellate Court's opinion and in Point IV of this brief leads to the conclusion that no such split exists, each case whether Federal or state, having been decided on its own merits. Further, the numerous decisions of both this Court and the lower Federal Courts cited in the Appellate Court's opinion show conclusively that the decision herein was rendered in accordance with pertinent Federal law.

ARGUMENT.

I.

This Petition Was Not Filed in Apt Time.

This petition seeks review of a judgment of the Appellate Court entered June 1, 1951 reversing the Superior Court of Cook County and directing an accounting in accordance with the findings and the conclusions of the Master (R. 363). On June 13, 1951 that Court denied petitioner's petition for a rehearing (R. 363). On June 22, 1951 the Court denied petitioner's so-called *Petition for a Rehearing to Reconsider and Grant said Petition for a Rehearing,* and also denied its petition for a certificate of importance, requested as the basis of an appeal to the Illinois Supreme Court (R. 364). Under Illinois practice the decree of the Appellate Court thereupon became final, since Section 75(2) of the Illinois Practice Act (Ill. Rev. Stat. (1951) Ch. 110 § 199(b)) provides that the Appellate Court's judgment shall be final in all cases, with three exceptions, two of which are here applicable; first, in cases in which the Appellate Court grants a certificate of importance, which was here requested and denied (R. 364); and second, in cases where the Illinois Supreme Court grants leave to appeal, which that Court will grant in *ex contractu* cases in only two instances; (a) *where the judgment appealed from* exclusive of costs shall be $1,500. or more and (b) in cases in which the *judgment is against the plaintiff* and a certificate is issued by the Appellate Court or by a Judge thereof in vacation that there is involved in the claim of plaintiff $1,500. or more.

The Appellate Court's judgment for plaintiff was not a money judgment but merely a judgment directing an accounting to determine the amount due. The certificate by the dissenting Judge, issued in vacation of the Court, (R. 364) that there was involved in plaintiff's claim $1,500. or more could not serve as the basis of the Illinois Supreme Court's jurisdiction since the judgment was not against plaintiff, a requirement for the issuance of the certificate. The Illinois Supreme Court correctly denied the petition for leave to appeal since the certificate was not issued within the purview of the section authorizing it, and was a nullity, the Appellate Court's decision remaining within the large body of decisions of that Court which are by Illinois practice made final, and not within the exception to that rule of finality. The Illinois Supreme Court has said in *Martin* v. *Estate of Ida I. Martin,* 377 Ill. 392, 395 (1941) that:

> "Continuously since the amendment of 1929, to the applicable section of the Practice act of 1907, the jurisdiction of this court to review judgments of the Appellate Courts in cases where the judgment is in favor of the plaintiff, is based upon the amount of the 'judgment' and not upon the 'amount involved,' as, under the prior acts. In view of this material change in the language of the jurisdictional section of the statute, the cases cited have no application to the statute as it is now worded.
>
> "Under the present statute this Court has no jurisdiction to review a judgment of an Appellate Court in an action *ex contractu,* where the judgment is in favor of the plaintiff and is less than $1500, except upon appeal granted by the Appellate Court, in accordance with the provisions of section 75 (2)(1) of the Civil Practice act." (Certificate of Importance).

> "Even before the statute was amended making the amount of the judgment the determining factor as to the jurisdiction of this court, it was held that where there was a trial on the merits, the amount of the judgment controlled as to the appellate jurisdiction of this court. It is only when there was no trial on an issue of fact in the court below that resort can be had to the pleadings to determine the amount involved." (Citations)

The petition for leave to appeal to the Illinois Supreme Court, being improper and contrary to Illinois practice, could not toll the running of the 90-day period provided by the Judicial Code (28 U.S.C.A. Sec. 2101 (c)) until September 12, 1951 when the Illinois Supreme Court denied that petition (R. 453), any more than could petitioner's completely extra-legal and unheard-of *Petition for Re-Consideration of Denial of Petition for Leave to Appeal* further toll the running of that period until September 21, 1951 when that petition, in turn, was denied (R. 453). If petitioner's position were correct any number of similar unauthorized petitions could be filed *ad infinitum* each in turn further extending the period in which this Court's jurisdiction might be invoked.

The decisions of this Court leave no doubt that when once a judgment has become final, the time for making application for certiorari begins to run. In *Dept. of Banking, etc.* v. *Pink,* 317 U.S. 264, (1942) for example, this Court in denying a petition for certiorari for want of jurisdiction because it was filed too late, said (p. 268):

> "For the purpose of the finality which is prerequisite to a review in this Court, the test is not whether under local rules of practice the judgment is denominated final (citing cases), but rather whether the record shows that the order of the Appellate Court has in fact fully adjudicated rights and that that adjudication is not subject to further review by

a state court. See *Gorman* v. *Washington University*, 316 U.S. 98. Where the order or judgment is final in this sense, the time for applying to this Court runs from the date of the Appellate Court's order, since the object of the statute is to limit the applicant's time to three months from the date when the finality of the judgment for purposes of review is established."

In *Morse* v. *U. S.*, 270 U.S. 151 (1926) this Court denied an appeal from the Court of Claims under circumstances analogous to those involved in this case. The Court of Claims decided against Morse in his action to recover salary on January 21, 1924, and denied his motion for a new trial on May 4, 1924. On June 9, 1924, he filed a motion asking that his case be reconsidered and a new trial granted, and on denial thereof, he attempted to appeal on September 5, 1924. This Court held that his motion of June 9 was a mere application for leave to file a motion and did not suspend the running of the 90-day period for appeal. The appeal was denied because not brought within 90 days of May 4, the date when the first motion for a new trial was denied, and therefore the date on which the judgment became final. A similar result was reached in *Gypsy Oil Co.* v. *Escoe*, 275 U.S. 498 (1927) in an application for certiorari to a state court.

For this reason petitioner's application for a writ of certiorari, not having been filed in the time provided by statute, should be denied.

II.

It Is Not the Custom of This Court Upon Certiorari to Question Findings of Fact Made by the Highest State Court.

Aside from the failure of petitioner to seek this Court's writ of certiorari in proper time, petitioner has not given this Court a factual basis to justify its intervention. Petitioner's prayer for certiorari is based on two factual assumptions, (1) that improper influence was contemplated by the parties or used by Buckley in securing for petitioner the numerous Government contracts, or (2) that Buckley did not come within the exception to Executive Order 9001 (50 App. U.S.C.A. § 611) allowing contingent fee contracts for agent securing Government contracts. Both of these factual assumptions are incorrect. As to the former, the Master specifically found that the use of political or personal influence by Buckley in procuring Government contracts for petitioner was not contemplated by the parties in their agreement nor was such influence used (R. 29). This finding was approved by the Chancellor (R. 46) and by the Appellate Court (R. 61) which under Illinois law has the right to make factual findings. *Hadley* v. *Union Trust and Savings Bank,* 308 Ill. 175 (1923); Ill. Rev. Stat. (1951) Ch. 110 § 213. It should be noted that no objection to the Chancellor's affirmance of the Master's finding in this regard was made by petitioner in the Appellate Court by cross-errors, necessary under Illinois practice to preserve such a finding for review, so that petitioner agreed as to the correctness of this finding and cannot now be heard to question it. *O'Brien* v. *First Galesburg National Bank,* 359 Ill. 415, 418 (1935); *Penn Plate Glass Co.* v. *J. H. Rice Co.,* 216 Ill. 567, 574 (1905); *Aachen & Munich*

Ins. Co. v. *Crawford,* 199 Ill. 367, 370 (1902); *Simon* v. *Reilly,* 321 Ill. 431, 433 (1926). This applies to chancery as well as to law actions. *Columbia Theatre Co.* v. *Adsit,* 211 Ill. 122, 124, (1904). See also Rule 35 of the Illinois Supreme Court. (Ill. Rev. Stat. (1951) Ch. 110 § 259.35).

The Master further found from the evidence that at all times involved in this action Buckley had been a *bona fide* and established commercial and selling agency maintained by petitioner for the purpose of securing business within the exception of Executive Order 9001 (R. 30) and the Appellate Court in affirming the findings of the Master also expressly found respondents to be within the exception. It said, "we are convinced by the evidence in this record that plaintiffs come within the exception contained in the regulation". (R. 428).

This Court has frequently held that it would not disturb findings of fact made by the highest state courts under any but the most extraordinary circumstances. In *Milkwagon Drivers Union* v. *Meadowmoor Dairies,* 312 U.S. 287 (1940), for example, it had before it an injunction in a labor dispute originally issued by an Illinois state court. The case had been heard by a Master in Chancery who recommended that the Union's picketing, being accompanied by violence, should be enjoined. The Chancellor overruled the Master and held that peaceful picketing could continue and that only the violence should be enjoined. The Illinois Supreme Court reversed the Chancellor and directed that a permanent injunction against all picketing, as recommended by the Master, be entered. This Court took the case on certiorari and affirmed the decision below, holding that it would not disturb the facts as found by the Master and authenticated by the Illinois Supreme Court. It said (p. 294):

"In this case the Master found 'intimidation of the customers of the plaintiff's vendors by the commission of the acts of violence', and the Supreme Court justified its decision because picketing, 'in connection with or following a series of assaults or destruction of property, could not help but have the effect of intimidating * * *'. *It is not for us to make an independent valuation of the testimony before the Master.* We have not only his findings but his findings authenticated by the State of Illinois speaking through her Supreme Court. We can reject such a determination only if we can say that it is so without warrant as to be a palpable evasion of the constitutional guarantee here invoked. The place to resolve conflicts in the testimony and in its interpretation was in the Illinois courts and not here. *To substitute our judgment for that of the state court is to transcend the limits of our authority.*" (Emphasis supplied.)

Petitioner has given this Court no evidence that would justify a conclusion that these findings are "so without warrant as to be a palpable evasion of the constitutional guarantee" as mentioned in the citation last above quoted, and this Court should not be asked to search this voluminous record and re-evaluate testimony to justify the contentions of petitioner that have already been found to be without merit by the Master, the Chancellor and the Appellate Court.

III.

Executive Order 9001 Does Not Bar This Action.

Aside from the factual findings that respondents come within the exception to the Executive Order, the argument of petitioner completely disregards the purpose and intent of the Executive Order. Executive Order 9001 (50 App. U.S.C.A. § 611) was issued by the President De-

cember 27, 1941 on authority granted by Title II of the First War Powers Act (50 App. U.S.C.A. § 601 *et seq.*) by which the President was empowered to authorize any department or agency of the Government exercising functions in the prosecution of the war effort to enter into contracts *without regard to existing provisions of law* relating to the making of such contracts, their performance, or modification, and to prescribe regulations in reference thereto. The Executive Order here involved authorized the War and other departments to enter into contracts of all types without regard to the provisions of law relating to the making of such contracts and the requirements relative to advertising, competitive bidding, performance, bonds or security. Title II of the Order prescribed regulations for the exercise of the authority conferred on the departments. Paragraph 1 requires the keeping of records of contracts by the various departments. Paragraph 2 prohibits discrimination because of race, color, creed or national origin, and further provides that all contracts would be deemed to incorporate by reference a provision that the contractor and any sub-contractor thereunder should not so discriminate. Paragraph 3 provided for assignment of claims, and paragraph 4 for advance payment. Paragraph 5, the paragraph involved herein, is as follows:

> "Every contract entered into pursuant to this order shall contain a warranty by the contractor in substantially the following terms:
>
> "The contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to annul the contract, or, in its discretion, to deduct from the contract price or consideration the amount of such commission, per-

centage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business."

Bradley v. *American Radiator and Standard Sanitary Corporation,* 159 F(2d) 39 (C.A. 2d, 1947) is relied on and quoted by petitioner (Br. 20) as holding that the exception of the Executive Order creates a privileged class of persons who may receive contingent fees for securing Government contracts while others may not. Assuming this decision correctly interprets the Executive Order, the finding of the Appellate Court that respondents were within that exception completely answers petitioner's contention. To hold otherwise would be to read the exception completely out of the Order.

It is significant to note among the cases dealing with the Order that where there is a finding that an agent is within the exception of paragraph 5 both the Federal and state courts uniformly allow recovery. *Reynolds* v. *Goodwin Hill Corp.*, 154 F. (2d) 553, (C.A. 2d, 1946); *Beach* v. *Illinois Lumber Co.*, 92 F. Supp. 564 (E.D. Ill. 1950); *Ebeling* v. *Swaine Mfg. Co.*, 892 S.W. (2d) (Mo. 1948).

The decision of *Mitchell* v. *Flintkote Co.*, 185 F. (2d) 1008 (C.A. 2d, 1951), relied on by petitioner and described as "controlling" did *not* involve an agent who came within the exception to the Order. This case is therefore neither controlling nor persuasive, and its loose language has been severely criticized in 64 Harv. Law. Rev. 1200. The same court, upon a finding that the agent came within the exception, allowed recovery. *Reynolds* v. *Goodwin Hill Corp., supra.* In *Bradley* v. *American Radiator & Standard Sanitary Corp.*, 159 F. (2d) 39 (C.A. 2d, 1947), it was also found that the agent was not within the exception.

Since respondents were bona fide agents within the exception to the Order, there can be no question of the validity of their contract on the grounds of public policy, because the enabling statute under which the Order was issued authorized the President to make regulations permitting Governmental departments to enter into contracts without regard to the provisions of existing law relating to the making, performance, amendment or modification of contracts. (50 App. U.S.C.A. § 601 *et seq.*).

Petitioner's contention that respondents could not come within the exception because their agency was limited to procuring Government contracts is contrary to the express purpose of the Order (See Exhibit 601, Report of the Hearings of the House Naval Affairs Committee on the Progress of the War Effort, Vol. 1, 78th Congress, first session, setting forth the full history of the enactment of the Order). In 1918, Attorney General Palmer proposed a warranty against contingent commissions of all kinds. President Wilson, in 1919, modified this to permit "contracts obtained through bona fide commercial representatives or agencies by an established business process everywhere recognized". The Attorney General thereupon modified the exception so that in 1923 it excepted contracts "secured or made through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business *with others than the United States*". But since so many agents represented contractors only before Government departments, the War Department in 1924 recommended modification of the exception by dropping the phrase, "with others than the United States". This change was approved by the Attorney General who, in commenting on this modification in a letter to the Interdepartmental Board of Contracts and Adjustments, said that the modi-

fication was within the purview of President Wilson's change. The warranty has remained the same to date.

This Court in *Muschany* v. *U.S.*, 324 U.S. 49 (1944) in approving the use of a commission system for Government purchases cited the Executive Order here in question, among others, as an expression of Congressional approval for this type of contract and said (p. 68) "We do not see that these statutes manifest a public policy against the use of a commission system for public purchases."

Various administrative branches of the Government have similarly approved this view. In *North American Iron and Steel Co.* v. *Navy Department*, 4 C.C.F., Par. 60,238 (1947) and *Alloy Products Corp.*, 4 C.C.F., Par. 60,389 (1947) the Office of Contract Settlement Appeal Board and the Army Board of Contract Appeals, respectively, approved agencies dealing solely with the Government. Comptroller General's decision No. B-26993, 22 Comp. Gen. 124 (1942) stated that it was not the purpose of the Executive Order to interfere with ordinary trade practices of persons desiring to contract with the Government.

A further argument against petitioner's contention is that it reads into the Executive Order sanctions not there contained by declaring the contract illegal and denying recovery. The sanctions provided by paragraph 5 of the Order are a right of the Government to annul the contract, and a right of the Government to deduct the amount of commissions paid. There is nothing in the Order even suggesting that a failure of compliance would invalidate a contract with a third person. It is axiomatic that where an act contains its own sanctions a court will not read into it other sanctions. This Court so held in the recent

case of *Bruce's Juices* v. *American Can Co.*, 330 U.S. 743 (1947), where in a suit on notes for the purchase price of cans, defendant contended the notes were uncollectible because given in a transaction involving a price discrimination condemned by the Robinson-Patman Act. This Court observed that this Act prescribed several specific sanctions, and that denial of the right to collect the purchase price was not one of them. The Court refused to add such an additional sanction by judicial legislation and allowed plaintiff to recover. It said, (p. 755):

> "But when the contract sued upon is not intrinsically illegal, the Court has refused to allow property to be obtained under a contract of sale without enforcing the duty to pay for it because of violations of the Sherman Act not inhering in the particular contract in suit and has reaffirmed the 'doctrine that "where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, *the punishment or the remedy can be only that which the statute prescribes.*" ' *D. R. Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U.S. 165, 174, 175; *Connolly* v. *Union Sewer Pipe Co.*, 184 U.S. 540." (Emphasis supplied.)

A similar result has been reached by the Illinois Supreme Court in *Grody* v. *Scalone*, 408 Ill. 61 (1950); and *Cohen* v. *Lerman*, 408 Ill. 155 (1951).

Wherefore petitioner's argument that the contract is illegal under Executive Order 9001 is without merit. The Order, if anything, specifically approves the contract.

IV.

Contingent Fee Contracts for the Procurement of Government Business Are Valid Under the General Law, Both Federal and State, Where No Improper Means Are Used or Contemplated.

In establishing the contract as valid under Order 9001 regardless of any existing general law to the contrary, we do not concede that petitioner's argument that there is a federal public policy against all contingent fee contracts for the procurement of government business is well founded. Indeed, the decisions of this Court, the lower federal courts, and the state courts involving contracts of this type indicate very clearly that under the general law such contracts are valid where legitimate business methods are contemplated and used by the parties. It is only where the courts find that improper political or personal influence is contemplated or used that such contracts are held invalid and against policy. A few of the significant cases holding such contracts valid where legitimate business methods are involved are; in this Court *Wylie* v. *Cox*, 56 U.S. 415 (1853); *Valdes* v. *Larrinaga*, 233 U.S. 705 (1914); *Steele* v. *Drummond*, 275 U.S. 199 (1927); in the lower federal courts—*J. E. Hanger, Inc.* v. *Fitzsimmons*, 273 F. 348 (C.A.D.C. 1921); *Allison* v. *Dodge*, 287 F. 621 (C.A. 3d 1923), second opinion 13 F. (2d) 588 (C.A. 3d 1926); *Coyne* v. *Superior Incinerator Co.*, 80 F. (2d) 844 (C.A. 2d 1936); *Aetna Standard Engineering* v. *Comm.*, 15 T.C. 284 (1950); and in the Illinois courts—*Leuy* v. *Standard Plunger Elevator Co.*, 296 Ill. 295 (1921); *Groome* v. *Freyn Engineering Co.*, 374 Ill. 113 (1940).

Decisions holding that such contracts are invalid because of improper, personal or political influence are *Providence Tool Co.* v. *Norris*, 69 U.S. 45 (1864); *Jamieson* v. *Iles*, 219 Ill. App. 432 (1920).

Professor Williston in his *Treatise on Contracts* has recognized this distinction among the cases, and in section 1729A he quotes with approval the following language of a New York Court:

> "To declare that he may not employ an agent, upon commission, where the Government is the prospective buyer, is to take away what is one of the elements of the enjoyment of ownership—the unrestricted right to sell. * * * Treated as a matter distinct in its nature from agreements to procure legislation, *an agreement to compensate an agent for his successful efforts in traffic with the government has been held binding where unfairness in the dealings or an intention to resort to corruption did not actually appear from the facts.*" (Emphasis supplied.)

Clearly the great group of contingent fee contracts in which legitimate business methods are contemplated and used are held by the courts, both Federal and state, to be valid obligations. In view of the Master's finding approved by the Chancellor, and affirmed by the Appellate Court in this case that no improper influence was contemplated by the parties or used by the respondents, there can be no doubt that under the general Federal law the contract of respondents and petitioner is binding and enforceable.

CONCLUSION.

Respondents respectfully urge that the petition for a Writ of Certiorari be denied.

Respectfully submitted,

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